

Asociacion Hospital del Maestro, Inc. and Unidad Laboral de Enfermeras y Enfermeros Profesionales de Puerto Rico and Marta Iris Aponte.
Cases 29-CA-4629 and 24-CA-4637

19 March 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS
HUNTER AND DENNIS

On 27 December 1982 Administrative Law Judge Bruce C. Nasdor issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions¹ and to adopt the recommended Order.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

¹ No exceptions were filed to the judge's finding that the Respondent did not violate Sec. 8(a)(3) and (1) of the Act by failing to reinstate strikers Aponte and Astacio.

The majority agrees with the judge's finding that the Respondent did not engage in unlawful photographing of picketing employees, but only for the reason that the General Counsel failed to prove that the photographers were the Respondent's agents; we find it unnecessary to pass on his alternative rationale. Chairman Dotson would adopt the judge's decision without modification.

DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge. This case was heard by me in San Juan, Puerto Rico, on September 13 and 14, 1982.¹

The complaint alleges that on or about February 19 Asociacion Hospital del Maestro, Inc.,² Respondent, discharged its employees Betsy Astacio Valentin and Marta Iris Aponte because they joined and assisted the Union and engaged in other concerted activity for the purpose of collective bargaining and mutual aid and protection. Over the objections of the Respondent, I allowed counsel for the General Counsel to amend the complaint. The amendment alleges that on or about February 16 through 19 and on other dates unknown the Respondent, at the hospital, took photographs of the various persons en-

gaged in legal picketing at the hospital. The Respondent denies the commission of any unfair labor practices.

Based on the entire record, including my observation of the demeanor of the witnesses, and after due consideration of the Respondent's brief,³ I make the following

FINDINGS OF FACT

I. JURISDICTION

At all times material herein, the Respondent has maintained its principal office and place of business at Avenida Domenech Final, Hato Rey, in the city of San Juan and Commonwealth of Puerto Rico, where it is, and has been at all times material herein, engaged as a health care institution in the operation of the hospital providing hospital, medical, and related health care services.

During the past year, which period is representative of its annual operations generally, the Respondent, in the course and conduct of its hospital operations, derived gross revenues therefrom in excess of \$250,000 and during the same period of time purchased and caused to be shipped and delivered to its place of business directly to points and places located outside the Commonwealth of Puerto Rico, materials and supplies valued in excess of \$50,000. The Respondent is now, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and a health care institution within the meaning of Section 2(14) of the Act.

II. THE LABOR ORGANIZATION

Unidad Laboral de Enfermeras y Enfermeros Profesionales De Puerto Rico the Union) is, and has been, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

On February 16, 1982, at 8 a.m., a unit of nurses commenced an economic strike at Respondent's premises. Out of a unit of approximately 87 individuals, 81 went on strike. As the result of alleged picket line misconduct on February 17, Betsy Astacio and Marta Aponte were terminated on February 19.

Astacio testified that on the afternoon of February 17 she saw a nurse and coworker, Zoraida Santiago, arrive at the hospital at the sidewalk in the rear of the hospital, and that she was cynically laughing at the group of strikers. According to Astacio she asked Santiago to please come over, that she wanted to talk to her, and Santiago went over to her. She allegedly told Santiago not to enter, i.e., cross the picket line, and for her to cooperate with the group. Furthermore, Astacio, according to her testimony, stated that those who would enter the hospital were taking prestige away from the hospital. At that point the group of strikers and pickets called her a strike breaker and this upset Santiago who, according to Astacio's testimony, began swearing profanities and racial slurs at Astacio. Aponte began calling Santiago a strike

¹ All dates are in 1982, unless otherwise specified.

² The caption appears as amended at the hearing.

³ Counsel for the General Counsel argued orally in lieu of filing a brief.

breaker and Astacio testified that Santiago similarly began swearing profanities directed to Aponte.

According to Astacio there were from 10 to 15 individuals in a group on the sidewalk across the street from the hospital. Astacio testified further that she believed Santiago was going to hit her, so she grabbed Santiago's arm. Moreover, according to this witness, Santiago was holding a bag in her left hand at the time Astacio grabbed her arm. Astacio also testified that Santiago did not try to strike her with her right hand which was free.

Aponte testified that on the day of the occurrence with Santiago, she was accompanied by a group of 15 to 20 strikers who were singing songs and slogans. At the time, on the opposite sidewalk was, in her words, "a girl who I did not know with a bag in her hand and laughing cynically, provoking those of us who were picketing." Santiago was walking down the sidewalk. Aponte testified that Astacio called Santiago and they commenced to talk. According to Aponte she saw that Santiago was agitated and all of those involved in the strike including herself were calling Santiago a strike breaker. Aponte testified further that Santiago told Astacio she would do whatever she felt like doing and Santiago proceeded to swear profanities at the two women.

Aponte testified that during the course of the conversation an egg was thrown from behind them. At that instant Santiago raised the hand holding the bag and took her other hand to wipe her face where the egg had hit her. According to this witness the egg was thrown from someone in the group which was behind them. Aponte testified that Astacio thinking that she, Santiago, was going to hit her with the bag, held her arm on which she was carrying the bag.

Aponte testified that she weighed 185 pounds. Aponte's affidavit reflects that a policeman⁴ came over and pushed her, apparently in an effort to separate her from Santiago. When she told the policeman there was no reason for him to push her the policeman responded that he was pushing her because she had hit Santiago. Counsel for the Respondent represents that the policeman had been subpoenaed and was to be present at the hearing. Counsel received a telephone call and was informed that the policeman had suffered an accident and would be unavailable.

Aponte testified that when Santiago arrived at the hospital on February 17 she was in street clothes rather than her nurses uniform.

Santiago testified that when she arrived at the hospital on the second day of the strike, as she was about to enter, she was approached by Astacio who was calling and screaming at her near the entrance to the parking lot by the emergency room of the hospital. According to Santiago she did not pay any attention to Astacio and continued walking towards the hospital. Astacio was calling her a "strike breaker, a sell out" and she continued not to pay any attention to her, at which point Astacio grabbed her on the left arm, held it tightly and continued calling her the names. At this time Santiago testified she was already on the hospital parking lot. Immediately

thereafter, Aponte approached them, took a rotten egg out of her purse, broke it on Santiago's face and rubbed it in. Santiago testified further that Astacio continued holding her arm until a policeman approached and separated them. Santiago testified that her right hand was touching the right side of her face because she felt pain. In evidence as Respondent's Exhibits 2 and 3 are photographs depicting the parties immediately after the incident. Respondent's Exhibit 3 reflects that Astacio is holding Santiago by her left arm, and in front of Santiago is Aponte, apparently screaming at her and waving her left arm.

Santiago weighs 106 pounds. She estimated the weight of Astacio to be perhaps 130 pounds or more.

Santiago testified that later the same day she went to the Investigations Room of the Judicial Center in order to file a complaint. Neither the Union, Astacio, or Aponte filed a countercharge. Santiago testified without contradiction that probable cause was found against Astacio and Aponte. Her un rebutted testimony also reflects that after probable cause had been determined Astacio and Aponte in the presence of the judge apologized for the incident. She further testified that Astacio and Aponte told her that they could lose their license to practice nursing, and that they would not be able to obtain work any other place. As a result of this, Santiago withdrew the criminal charges.

Santiago testified that although she was a member of the Union she chose to cross the picket line. She denied that Astacio called to her "Zoraida, stop for a minute," and she also denied being told by Astacio "please do not cross the picket line you know that *demeans* all nurses here." She continued throughout her testimony to maintain that the egg was smashed against the right side of her face by Aponte, and was not thrown by the other picket or pickets.

Humberto Monserrate, the Respondent's director of industrial relations and personnel, testified that he made the decision to discharge Astacio and Aponte as the result of the incident with Santiago, and that there was no connection between his decision to terminate these two individuals and their right to participate in the strike. He further testified that neither Aponte nor Astacio belonged to the Union's negotiating committee nor were they union delegates. After the strike ended, out of the 81 individuals who struck Respondent, all returned to work with the exception of Aponte and Astacio. Respondent introduced, without objection, certain exhibits⁵ from Aponte's personnel file, which counsel for the Respondent avers demonstrate her volatile character and temper. Some of the documents reflect that supervisors considered Aponte to have an explosive temperament.

Photographing the Pickets

Alleged as an independent violation of Section 8(a)(1) of the Act is the photographing of the pickets by hospital agents.

Radames Quinones Aponte, the Union's director, testified that there was a photographer from the hospital on

⁴ There were state police, possibly six of them, at the scene of the picketing.

⁵ See R. Exhs. 5-12.

the roof of the hospital. The man had a camera and he assumed that because he was on the hospital's roof, he must have had authorization from the hospital. He did not know the name of the person who was taking the photographs from the roof of the hospital. There were other individuals with the photographer and Quinones stated that they were employees of a subcontractor, although he did not know the name of the subcontractor for whom they worked, and he had never seen a copy of any contract. Quinones' testimony was that ample coverage was given to the strike by the press and television. He stated that he knew the strike was covered by television cameras and that newspaper photographers were also present, since pictures of the picketing appeared in the newspapers.

Aponte, one of the two alleged discriminatees, testified that she saw three photographers "located on the upper part of the hospital." She testified that one of the photographers got friendly with her but she was unable to name who the photographers were, or specify their connection as an agent with the Respondent.

Quinones testified that on the first day of the strike the "immense majority" of the union members at the front of the hospital were picketing, over 50 individuals. He further stated that there were two police cars with close to six state police present. Aponte testified that on the first day of the strike the pickets were located at the main entrance to the hospital and that there were about 20 to 30 policemen present.

The strike, which was an economic strike, occurred during the negotiations for a third contract. This union has represented these employees for over 6 years and the Respondent negotiates a total of seven collective-bargaining agreements with three different unions.

Conclusion and Analysis

I fully credit Santiago who had nothing to gain by presenting her version of the incident. I believe she presented the facts accurately, bearing no malice, nor harboring any grudges against Aponte or Astacio. Having seen first hand the relative physical proportions of these women, I do not believe that Santiago, discreetly entering the back of the hospital in street clothes, provoked the incident. Rather I believe that Aponte and Astacio, whom I discredit, participated in an assault and battery. Therefore I find that Aponte and Astacio were disqualified from the protection of the Act, and that their conduct furnished a proper basis for the terminations.

E-Systems, Inc., 244 NLRB 231 (1979), cited by counsel for the General Counsel is inapposite. There a striker was discharged for hitting an employee with a length of string several feet long. The instant case, not similar in all respects, is more like *Alcan Cable West*, 214 NLRB 236 (1974). Although other facts were present, the Board found that an assault provided a sufficient basis for refusing to recall an employee at the conclusion of a strike.

In *Hedstrom Co.*, 235 NLRB 1198 (1978), an employee was found to have engaged in conduct which disqualified him from the protection of the Act. Accompanied by threats, the employee made bodily physical contact to vehicles—not persons. He hit a car with his body causing the side view mirror to be flattened against the side

of the car. He also kicked the fender of a slowly passing pickup truck. It is also noted that this was an unfair labor practice strike, yet still his discharge was found to be warranted.

The conduct engaged in by the two subjects of this complaint was unprovoked by any unfair labor practices on the part of the Respondent. Accordingly I will recommend that these 8(a)(1) and (3) allegations of the complaint be dismissed.

Photographing the Pickets

Counsel for the General Counsel was unable to prove any agency relationship between the photographers and the Respondent. The record is clear that local television and newspaper photographers were on the Respondent's premises.

Even assuming *arguendo* that the Respondent engaged photographers, its objectives in my opinion were lawful. The legitimacy of its photographing is buttressed by the fact that an incident did occur on the picket line as discussed *supra*, and photographs were utilized by the Respondent in the presentation of its defense in this case.

In *National Spinning Co.*, 174 NLRB 379 (1969), the trial examiner found with Board approval that picture taking was not violative, where the photographs were taken in a good-faith attempt to attain evidence for possible use in court proceedings. As in this case, the photographing was not accompanied by threats of retaliation for striking. Moreover, in view of that fact and of the large number of pictures of pickets taken by newspaper photographers the Respondent's action was not threatening to the employees to such a degree as to require limitation of the Respondent's right to protect its interest by the photographing.

There was no unlawful surveillance or the creation of the impression of surveillance in *Matlock Truck Body Corp.*, 217 NLRB 346 (1975). The Board sustained the administrative law judge in his finding that there was a legitimate reason for taking motion pictures of the company premises and activities on the road abutting the premises, where company property had been vandalized and nonstriking employees had been harassed. The photographs were taken for use in conjunction with an application the company was making to hold persons in contempt of a state court injunction. Thus there was a legitimate reason for taking pictures. See also *Hilton Mobile Homes*, 155 NLRB 873 (1965).

I therefore find and conclude that the Respondent did not act with an object of threats or intimidation nor were the employees coerced by the photographing. Accordingly I will recommend that this allegation of the complaint be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. The allegations of the complaint that the Respondent has engaged in conduct violative of Section 8(a)(1)

and (3) of the Act have not been supported by substantial evidence.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁶

⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the

ORDER

It is recommended that the complaint herein be, and it hereby is, dismissed in its entirety.

Board and all objections to them shall be deemed waived for all purposes.